SUPREME COURT

OF

JUDICATURE BOMBAY,

TUESDAY, AUGUST 10, 1830.

At the Sitting of the Court this morning the Foreman of the Grand Jury informed the Court that they had received three Bills against Captain Hawkins for Piracy in having carried away certain persons as slaves from the Coast of Africa, and that before they took them into consideration they were desirous to hear from the Court an explanation of the law concerning that offence.

The Chief Justice replied that in compliance with their request he should endeavour to afford them the bes' explanation in his power of the statute on which the Bills now before them were framed, and on what points they ought to be satisfied before they brought any one within its penalties. The statute which they had to consider was the 5th of his present Majesty, Cap. 113, which is stiled an act to amend and consolidate all the laws relating to the abolition of the slave trade. The first section of the act, repealed all previous enactments relating to the slave trade and the exportation and importation of slaves, save as the act itself confirmed them. Except, t erefore as it might assist them in understanding the scope of the statute which embodied all the law on the subject, it was unnecessary to bring any of the repealed acts to their notice. But as he should have occasion to request their attention to a recent decision in the Court of Admiralty in a case very likee ly to afford them instruction in an inquiry lik- the present, he should remind them of the state of the law as it stood under the 47 Geo. 3d: Cap: 111 *a* 36 with reference to which statute the case he had alluded to was decided. The first act for the abolition of the slave trade passed on the 25th of March 1807.

In the preamble of that statute it was declared that from the 1st day of May the African slave trade and all manner of dealing in the purchase, sale, barter or transfer of slaves, or persons intended to be sold, transfered, used, or dealt with as slaves practised or carried on, to or from the coast of Africa was utterly abolished and declared unlawful; and if any of his Majesty's subjects should deal, trade in, purchase, sell, or barter or transfer, any slave, or any person, to be dealt with as a slave he should pay a penalty of 100 £ for every such offence, and Vessels fitted out or used for the purpose thus declared unlawful, became forfeited.

It was also declared unlawful to fit out or procure to be fitted out, or to be concerned in the fitting out of any ship for the purpose of being employed in the African slave trade or in any of the concerns declared unlawful and every ship so fitted out was forfeited. And it was further declared to be unlawful to carry away, or remove or procure or aid in the carrying away as slaves, or for the purpose of being sold, used or dealt with as slaves, any of the inhabitants of Africa or of any Island or Place in the West Indies or other part of America not being in His Majesty's Dominions either immediately or by transhipment at sea from Africa or other place as aforesaid to any other place whatever.

And also to receive detain or confine on board any such inhabitant as aforesaid for the purpose of his being so carried away or removed or of his being sold, transferred or dealt with as a slave in any place or country whatever. Vessels employed in such removal, or employed for effecting any of the above unlawful purposes were forfeited.

And every one who as Owner, Shipper, Factor, Captain, Mate, Supercargo, and Surgeon, should unlawfully carry away or remove, detain, confine, tranship, or receive on board for any of the above unlawful purposes a ny such inhabitant, or assist in so doing was ma de liable to a penalty of 100 £ for each perso n so carried away. Slaves so carried away to any colony or any place in His Majesty's Dominions and sold or detained in slavery were forfeited to His Majesty,—They would perceive when he read to them the late act of parliament that the law had been changed in little, save in degree of punishment. What was declared to be unlawful in the act he had just referred to, is declared to be unlawful in the only statute now in force. What was then punishable by Penalty and forfeiture may still be so punished, but the offenders are declared to be Pirates and felons, so that a person may be sued in the Admiralty Court for the Penalty or in the Criminal Court for his life.

Whilst the recollection of the act he had mentioned was fresh in their minds he would request their attention to a case decided by Lord Stowell in the year 1822. On appeal from the Court of Vice Admiralty at the Isle of France. They would derive much assistance from his Lordship's remarks in giving his judgment, and in noting the tests by which he judged whether certain individuals were, or were not in a state of slavery. The case is that of the Woodbridge, Munnings reported in Haggard's Admiralty Reports. The Woodbridge, Captain Munnings arrived at the Mauritius in the month of January 1819, and

was seized by Captain Purvis of H.M. S.. Magicienne upon information that eight blacks who had been taken into the employment of the Ship at Madagascar were slaves. Proceedings were originally instituted against the Ship and cargo but the libel which was framed upon the 46. Geo. 3. C, 52. and 47 Geo, 3. C. 36. was amended and the cargo was released. There had been a Decree of Restitution of the Ship to Munnings the Claimant, but without costs and damages, from that Decree he appealed the result of the case was that the judgment of the Court in the Mauritius was affirmed, the Court pronounced against the appeal and condemned the appellant in 130 £ nomine expensarum. It was for the line of argument pursued by Lord Stowell in pronouncing his judgment that he had brought the case to their notice. His Lordship observed that,

This was the seizure of a British ship by an officer of the Royal navy who in that Capacity was specially authorized to make seizures of a similar description, it was the seizure of a ship having on board persons supposed to be slaves or dealt with as such. It appears that Mr. Munnings the Captain and owner of this Merchant Vessel being desirous to avail himself of the Premium offered to all Persons importing asses or mules into the Mauritius, went thencoeto the Port of Muscat in the Red Sea where he took on board a Cargo of those animals, and set sail on his return, in the course of his voyage he was compelled to put into Madagascar, there the vessel was found to be not navigable with the hands she had on board, her crew having been reduced by Sickness. Captain Munnings thereupon consulted the masters of twn other Merchantmen then lying at Tamatavie who were unable to afford him the assistance he required, but recommended him to apply to the Sultan of Tamatavie, and the result of this application was, that eight men were sent on board the Woodbridge; how or in what manner they were procured does not appear, but there certainly was no Contract with them for wages or otherwise on the part of Captain Munnings with these Persons on board, the vessel sailed for Calcutta whence she proceeded with a Cargo to the Mauritius, and was there seized by Captain Purvis for a supposed violation of the Abolition Laws.

Here observed Lord Stowell is a very simple issue of fact, whether these eight Persons were aboard this ship in such a capacity of slaves as constituted the offence against the statute cited in the second article of the libel. This statute enacts that all manner of dealing and trading in the Purchase, Sale, Barter or Transfer of Slaves or Persons intended to be sold, transfered, used or dealt with as slaves that may be practised or carried on in at to or from any part of the Coast or Countries of Africa shall be utterly abolished, prohibited and declared to be unlawful; and also that all manner of dealing, either by way of purchase, sale, barter, or transfer. or by means of any other contract or agreement whatsoever relating to any slaves, or to any Persons intended to be dealt with as slaves for the purpose of such slaves or Persons being removed or transported either immediately or by Transshipment at Sea or otherwise is in like manner utterly abolished and declared to be unlawful.

It is impossible not to see that these are Terms of great extent of possible application, and such as would require from any Court a very deliberate and inquisitive attention to any Case of fact that appeared to approach the limits within which the Penalties were to be let loose upon the offender; they were devised by the legistature engaged at that time (as it has been since) in the ardent Pursuit of an effective cure for an evil which is considered as of great magnitude, and conquerable only by a most vigilant and searching Police, looking on all sides and into every artifice by which the mischief complained of might seek to elude the prohibitions of the law. Nothing short of strong constructions of strong enactments could answer the expected purpose; all the avenues to fraud were to be shut up, even though immediate fraud might not be intended in the Particular Case; in short a jealous and inquisitive guard was to be maintained against the possibilities of evil.

Upon the ships' arrival at the Mauritius with eight persons on board bearing the appearance of slaves Captain Purvis seized her. This was on the 27th of January 1819; It is admitted that he was perfectly right in that act, and that he would have deserted his duty if he had not done so, why he did not proceed at that time is quite unaccounted for, he had nothing to do but to apply to the Court for its monition to Mr. Munnings to produce his papers and witnesses to be examined, the Court must have granted that monition, and would have enforced it, though Mr. Munnings does not seem to have had an adequate Idea of the authority either of the seizing officer or of the Court. Enough would then have appeared to raise the question of law on which the Court had to decide, whether these persons were there in the capacity of slaves, so as to subject the Captain and Owner of the ship and of these slaves to the penalties of the act. The whole matter would have passed without any of those preliminary Proceedings which afterwards served only to waste useful time and to produce useless irritation." After commenting on the delay which had taken place, Lord Stowell continued,

Now what would have appeared if Captain Purvis had proceeded in the first instance? These facts—that the men in question were sent on board without any contract of their own for wages or for any thing else; and, indeed, without any consent on their own part,

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They came in ignorance, and under false representations given and without any assurance which they could rely on that they were ever to be brought back to Madagascar; or what was to become of them. Upon the Papers and their evidence, it would have appeared that they were made free and received manumission from Captain Munnings on the voyage, thereby admitting on his part most decidedly that they came on board not in a state of freedom, and likewise, that being not in a state of freedom they must have been the slaves of Mr. Munnings; for otherwise how could he have the Power of Manumitting them? Nobody but their owner could do that. What circumstances could carry them nearer to the condition of slaves than these—when they entered the Ship without their consent, to be obliged to give their labour without any Pay, and without any certainty about their future destination, it is impossible for a man to describe a more servile state than such circumstances as these compose, if Alfords evidence had been called in (to whose testimony I see no objections) it would have appeared that these certificates and entries had been prepared with dates that did not belong to them, but were better accommodated to the safety of the Transaction. What was there to be opposed to this? why, first, that they were to work only as Sailors, and did only so work. Surely they were not the less slaves on that account, if they were slaves at all. A slave may work like a Sailor as well as in any other capacity implying manual labour, Men do not take slaves to sit with their hands before them doing nothing, but to be profitable by their labour, one way or other, by land or water, indifferently. Next it is said that they were treated as Lascars, in food, clothing, and employment. What does that prove? These men could not be served, nor kept, I apprehend, cheaper than Lascars. Lascars are not over voluptuous feeders on board a Ship. As to clothing, hardly less could be afforded for the sake of mere decency; and the employment must of necessity be the same. But they were permitted to go ashore! And so, I imagine, slaves would occasionally be, especially in a country where they were totally ignorant of the language, and therefore not very likely to escape. But, I repeat, that so long as these men continued to be obliged *to give their* labour without any consent of theirs, so long they continued slaves, if slaves they came on board. Again, it is said that at Calcutta there is a strict police, and the matter must have been strictly examined there, How so? Supposing the general police to be strict, it does not appear that there was any examination of these men; there is no copy of any proceedings of any Court, or under any authority, nothing appears but the mere fact that the ship escaped there; as she did afterwards at the Mauritius. It was after leaving Calcutta that Alford acquired his information, which was not till then possessed.—Supposing as the fact was that Alford's testimony was not in Captain Purvis', possession on the 27th of January, still there was quite enough to bring the question of law before the Court, whether the taking these persons on board, though under the plea of existing necessity, and for the sole purpose of navigating the Ship did not bring Captain Munnings's transaction within the terms of the penal prohibition, under the strict construction which seems expected to be applied to this class of Statutes. Why Captain Purvis released the Ship on the 27th of January—I am quite a loss to conceive—In all probability, as far as I can collect from the terms of the learned Judge's sentence, his Judgement upon the matter of restitution would have been the same, but with an indemnity to Captain Purvis for the expences of the proceeding; for to that he would clearly have been entitled, as nothing vexatious could be objected against him."

In conclusion Lord Stowell observed respecting the Restitution of the Ship which had been decreed to Munnings the claimant, and concerning which Captain Purvis had appealed —"The counsel estimate the real merits of the question very differently from what I do, when they represent this question as one that was placed out of all doubt, and could not be seriously contested—For I must say, that looking at the terms of the statute, and recollecting the sort of construction which is required to be applied to them, I should have thought that this question, if it had come originally before me—imposed upon me the duty of giving it a very grave and deliberate consideration. I do not say that I might not have ultimately acquiesced in the same conclusion, for I do not mean to impugn the Judge's sentence; but, weighing the facts of this case, and attending to the principle which I have stated, that though the intention of Captain Munnings might be perfectly innocent, yet the transaction was one which, being permitted, might open a door to transactions of a different nature, I might have hesitated before I ventured to unlock that door. It is admitted that the case was most highly proper to be brought before the first Court; and the party was not perfectly justified in reserving to himself the right of resorting to a second opinion, can be doubted by none who have attended either to the case itself, or the terms in which the first opinion was delivered."

In the above case they had the opinion of one of the greatest lawyers in modern times on a state of facts which as far as they went seemed to bear a general resemblance to the case that would come before them. There the Court of Admiralty had to decide this question. What in the Eye of the law was the situation of Eight African men found on board a British Ship who had been taken on board on the

Coast of Africa, and of whom it could not be proved that they had voluntarily entered into the service, or that with them any contract had been made; they had heard the tests by which that case was judged, how compatible in his opinion was a state of Slavery with being employed as a sailor; and occasional going on shore with continuance of Slavery; that subsequent manumission was a conclusive proof of former slavery in the slave, and of ownership in him who set free, and that no state can be more servile, than one of unwilling labour and uncertain in its duration. And yet it was impossible that any case could occur which admitted of more exculpation than the above. The ship had sailed with a large compliment of men 61. in number. It was never contemplated to add to their number by obtaining Africans, the object of the voyage was lawful, the Destination free from suspicion; and it was the urgent necessity of the case which compelled her to put into Madagascar, her crew being reduced from 61 to 10. in number. Even then before resorting to the Sultan of Tamatavie, application was made to two Captains of Merchantmen who could not or would not assist her, and only then application was made to the Sultan, and the men obtained, and yet, notwithstanding all these circumstances, it was matter of grave doubt in the opinion of Lord Stowell whether these facts did not constitute an offence under the 47, Geo. 3. He would by no means apply to the criminal provisions of the 5. Geo, 4. that liberal construction which his Lordship said was required; that obervation was made, when the heavy penalties of Death and Transportation were not attached to the offence. There could be no latitude of construction to take away life or liberty. On the contrary it was a fundamental Rule that whenever any ambiguity arises in a statute, introducing a new penalty or punishment the decision shall be on the side of lenity and mercy; and as had been justly observed, it is more consonant to principles of liberty, that the judge should acquit whom the Legislature intended to punish, than that he should punish those whom the legislature meant to discharge.—The same words in a statute would bear different interpretations according to the nature of the suit or prosecution instituted upon them. As by the 9. Anne. c. 14. the statute against gaming, If any person shall lose at any time or sitting 10. £ and shall pay it to the winner, he may recover it back within three months, and if the loser does not within that time, any other person may sue for it, and treble the value besides. So where an action was brought to recover back fourteen guineas which had been won and paid after a continuance at play, except an interruption during dinner, the Court held the statute was remedial, as far as it prevented the effects of gaming without inflicting a penalty, and therefore, this action, they considered it one time or sitting; but they said, if an action had been brought by a common informer for the penalty, they would have construed it strictly in favour of the defendant, and would have held, that the money had been lost at two sittings 2. . Blac. Rep. 1226.—and note to 1 Blac. Com. p 88.

The next change in the law was effected by the 51st Geo. 3rd C. 23 by which all persons carrying on the Slave trade or any way engaged therein were declared to be felons. It would not yield any instruction to them if he dwelt on that act, as it was no longer in force; along with all the preceding enactments it was repealed by the 5 Geo. IV. C. 113 to which statute, he must request their attention. It was an act drawn up with great care, ample in its provisions so as to embrace all possible situations or combinations by which its efficacy might be avoided.—It followed the plan of 47 Geo, 3 in declaring at the outset what shall be illegal, and referred to that Declaration when the object of any particular act was alluded to. It was first declared that it shall not be lawful except in such special cases as are therein after mentioned for any persons to deal or trade in, purchase, sell, barter, or transfer Slaves or persons intended to be dealt with as slaves or to carry away or remove slaves or other persons, as or in order to their being dealt with as Slaves or to import or bring them into any Place whatsoever or to ship, tranship, embark, receive, detain or confine them on board of any ship or Boat for the purpose of their being carried away or removed as or in order to their being dealt with as Slaves, or to ship, tranship, embark, receive, detain or confine on board of any Ship, Vessel or Boat, Slaves or other persons, for the purpose of their being imported or brought into any place whatsoever as or in order to their being dealt with as Slaves, or to fit out, man, navigate, equip, despatch, use, employ, let or take to freight, or on hire any Ship, Vessel or Boat, in order to accomplish any of the objects which have been declared unlawful; or to lend, or advance or become security for the Loan or advance of Money, Goods or Effects employed or to be employed in accomplishing any of such objects, or to become security for Agents employed or to be employed in accomplishing any such objects, or in any other manner to engage or to contract to engage directly or indirectly therein as a partner, agent or otherwise, or to ship, tranship, lade, receive, or put on board, of any Ship, Vessel or Boat, money goods or effects, to be employed in accomplishing such objects, or to take the charge or command, or to navigate or enter and embark on board of any Ship, Vessel or Boat, as Captain, Master, Mate Petty Officer, Surgeon, Supercargo, Seaman Marine or Servant, or in any other capacity, knowing that such Ship, Vessel or Boat is actually employed or is in the same voyage or upon the same occasion in respect of which

they shall so take the charge or command, or navigate or enter and embark or contract so to do as aforesaid intended to be employed in accomplishing such objects, or to insure any slaves or any p operty, or other subject Matter engaged or employed, in accomplishing any of the objects hereinbefore declared unlawful.

In all the above instances the contracting to do what is declared unlawful or assisting therein is declared to be equally illegal as the act itself.

In the 10th Section of the act is is enacted that.—

If any subject of his majesty shall, upon the High Seas, knowingly and wilfully carry away, convey or remove any person or persons as a slave or slaves, or for the purpose of his or their being imported or brought as a slave or slaves into any Island or place whatsoever, or for the purpose of his or their being sold—used or dealt with as a slave or slaves, or shall knowingly ship, receive, detain, or confine on board any ship—vessel or boat any person or persons for the purpose of his or their being imported or brought as a slave or slave into any Island or place whatsoever, or for the purpose of his or their being sold or dealt with as a slave then such person so offending shall be deemed guilty of Piracy, &c.

In that clause there are five separate offences contemplated, all of which are made Piracy.

1st To carry away or remove any person as a slave.

2d To carry away or remove any person for the purpose of his being imported or brought as a slave into any place whatsoever.

3d To carry away or remove any person for the purpose of his being sold or dealt with as a slave.

4th Knowingly to receive or detain on board any ship any person for the purpose of his being imported or brought as a slave into any Island or place whatsoever.

5th Knowingly to receive or detain on board any ship any person for the purpose of his being sold or dealt with as a slave.

To constitute the first offence the person carried away or removed must be carried away as a slave; To constitute the second the person must be carried away for the purposes of being imported or brought some where as a slave; he need not be carried away *as* a slave, but of the purpose of carying him away they must be satisfied. Therefore to carry away a freeman with that purpose would constitute the 2d offence.

To constitute the third there must be a different purpose in carrying him away namely to sell or deal with him as a slave.

To constitute the fourth the receiving or detaining on board must be for the purpose of his being imported or brought somewhere as a slave.

To constitute the 5th, the receiving or detaining must be for the purpose of his being sold or dealt with as a slave.—And all of the above offences must be committed within the Admiralty Jurisdiction.

The next section of the statute enacted that it shall be felony,

To buy or sell slaves or persons intended to be dealt with as slaves.

To carry away or remove slaves or other persons, as or in order to their being dealt with as slaves.

To import or bring into any place slaves or other persons as or in order to their being dealt with as slaves.

To ship or detain or confine on board of any ship slaves or other persons for the purpose of being carried away or removed as or in order to their being dealt with as slaves.

To ship or tranship slaves or other persons for the purpose of their being imported or brought into any place whatsoever, as or in order to their being dealt with as slaves.

To fit out, or let any ship for any of the objects declared unlawful.

To advance money for such purpose.

To become Guarantee for agents employed in accomplishing such unlawful objects.

To contract as a Partner in such contracts as have been declared unlawful.

Knowingly to ship, or receive on board money or goods to be employed in accomplishing those objects declared unlawful,

To command or navigate, or enter any ship as Captain, Master, Mate, Surgeon, or Supercargo, knowing that it is employed or intended to be so employed in accomplishing &c.

To insure slaves or property so employed.

To forge any certificate &c. or utter the same, such certificate &c. being required by the act. And those guilty their procurers, aiders or abetters are declared felons, and may be transported for 14 years or kept to hard labour for not more than 5 years or less than three years at the discretion of the Court.

One important alteration in the law was effected by that statute; the offence was made no longer to depend on the Country from which a Slave was carried. It was declared to be equally illegal from all places except where expressly provided for by the act. They would also observe that in the 13th Section it is enacted, that nothing in the act contained shall be taken to prevent the employment of Slaves in navigation in numbers not greater than those usually employed in navigating such Ship or Vessel, It could not be inferred from that permission that slaves might be purchased for the purposes of navigation, were it so the act might with impunity be evaded. It must be taken to allude to cases where slaves are lawfully possessed and employed as they are in the West Indies. That permission nevertheless was ne-

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cessary as all shipment of slaves was prohibited by the act. They could not do wrong however in satisfying themselves of the usual Compliment of men, in the ship in question. They would observe that in 22 Section where slaves are condemned as prize, his Majesty is enabled by order in Council to enable such persons as he shall appoint to enlist them in the Military, Marine and Naval Services for a period not greater than seven years which destroyed the supposition, could it seriously be entertained that Slaves might legally be purchased and carried away for the purposes of navigation. There had been too much experience lately of Crimes committed within the Admiralty Jurisdiction of this Court, and the requisites of the Crime of Piracy had been too often explained to them, to make it necessary for him again to describe them. But any question they might propose the court would willingly answer. He had only further to observe that before they could find a Bill for the first offence they must be satisfied that the person carried away, was carried away as a slave, they must therefore satisfy themselves concerning his condition at the time of Removal. If at that time he was in a state of Slavery, and being so was transferred by his Master and carried away without any consent of his own, he feared that they could have no doubt as to their finding. With respect to coming voluntarily on board, a point which they would probably have to consider, their own discretion would best guide them, taking all the circumstances into consideration, the situation and age of the party, his capability of understanding what was said to him, his knowledge of what he was doing, and with whom he was going and whether there was such a medium of communication between the parties as they considered satisfactory. In all cases within the act he thought the purpose was most important, although, strictly speaking the mere purchase of a Slave even for the purpose of immediate manumission was an offence within the statute, though widely different in guilt, and this for very apparent reasons; the principal object of the legislature was to discourage the traffic, to prevent the dealing in slaves being an object of profit to any one; it was therefore made unlawful to purchase a slave, as it was made unlawful to purchase a person for the purpose of his being dealt with as a slave. With respect to all the Cases where the purpose for which a slave or other person was carried away formed part of the offence, they would consider that in the eye of the law all men are intended to purpose that which they do, till the contrary be shown and if they should find that a country where slavery prevails, was visited without necessity or object, and that persons in a state of slavery were purchased and received on board a Ship, and carried away in a state of unwilling and constrained servitude or were so detained or shipped as in the different Terms of the act, he feared that in the eye of the law it must be considered that they were so received, or detained for the purpose of being dealt with as slaves. He had only now to impress upon them the absolute necessity of banishing from their minds all that they might have heard concerning the particular circumstances of the case coming before them. They were too well acquainted with their duties to make it necessary for him to remind them of what Rules of Evidence they must keep in mind in examining witnesses, but they would remember, that the same law of evidence ought to prevail in a Grand Jury Room, as in that Court, that in either hearsay Evidence was totally inadmissable, or secondary evidence of that which was capable of higher proof. They would readily believe that he could not but feel pain that an explanation of the highly penal clauses of an act for the abolition of the slave trade, should for the first time become necessary by such a charge as the Bills now before them presented, being brought against an officer high in Rank in an Honorable Service; such a conjunction the most speculative could never have foreseen, but their feelings of regret that aught of such a nature should be connected with one belonging to a service, whose dearest care had been to repress this traffic, and to whom the Legislature had always assigned that honorable task, must not, and would not prevent them from performing firmly their duty, however painful it might become, of dealing with the case as it should stand in evidence and be declared by law, with as constant a mind as if it were one of ordinary occurrence and the accused totally unknown and undistinguished.

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